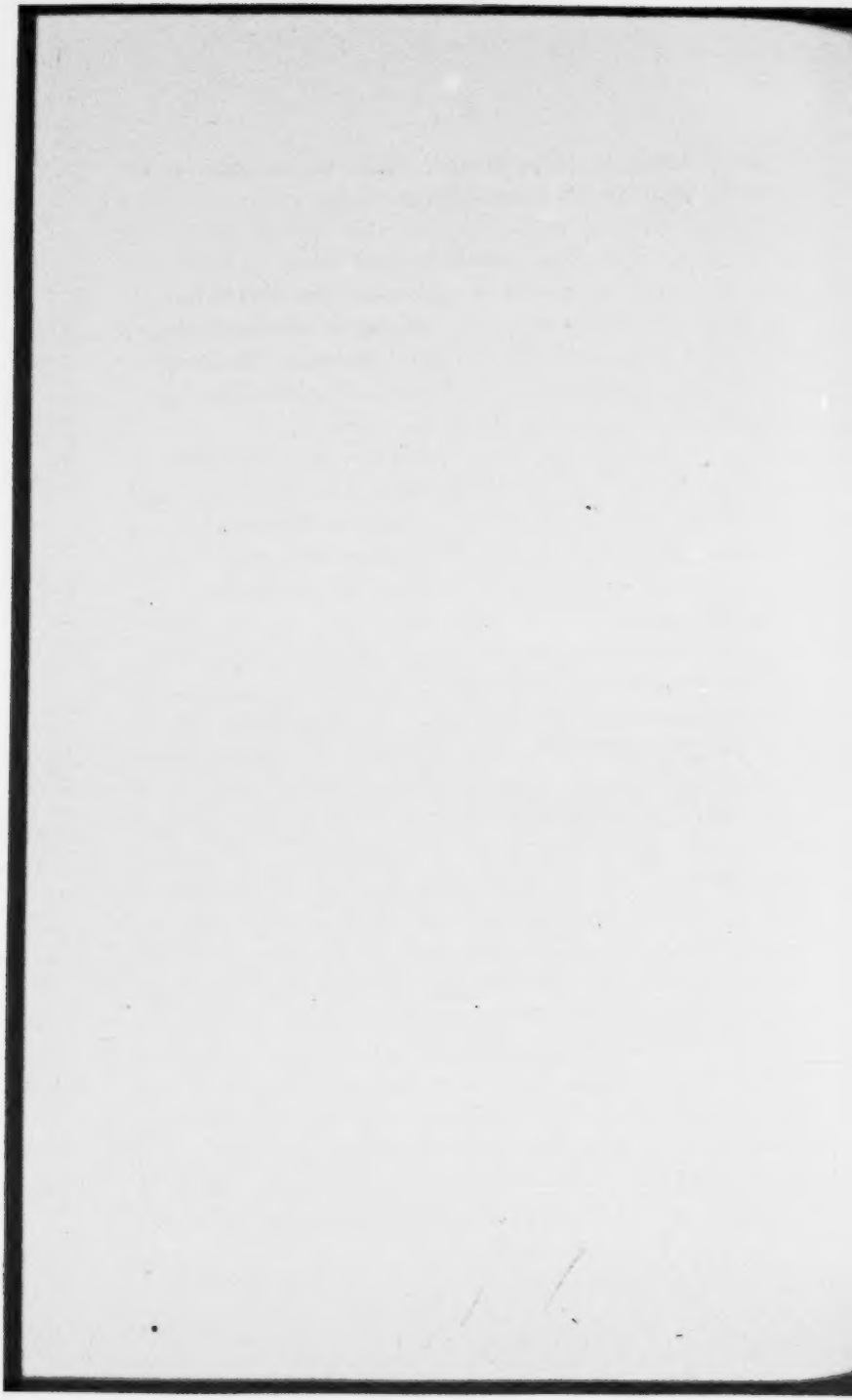

In the

Supreme Court of the United States

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OCTOBER TERM, 1949

No. 335

EDGAR B. WHITCOMB, ANNA S. WHITCOMB and HENRY J. HELMERS, JR.,

Petitioners,

vs.

EARL L. CLARK, Drain Commissioner of Oakland County, STATE LAND OFFICE BOARD, INTERURBAN LAND COMPANY, LAWRENCE WESTPHAL, EUGENE W. KNAPP and BEULAH V. KNAPP, his wife, CITIES OF ROYAL OAK, PONTIAC, FERNDALE, BIRMINGHAM, BLOOMFIELD HILLS, BERKLEY, OAK PARK, HAZEL PARK, CLAWSON, PLEASANT RIDGE and HUNTINGTON WOODS, TOWNSHIPS OF SOUTHFIELD, BLOOMFIELD, TROY and ROYAL OAK, COUNTY OF OAKLAND, CHARLES M. ZIEGLER, State Highway Commissioner, ASHTON J. BERST and EDWIN H. WATERHOUSE,

Respondents

BRIEF OPPOSING PETITION FOR CERTIORARI

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Brief Opposing Petition for Certiorari

I

Opinions of the courts below.[*]

The opinion (303) of the court below is officially reported as Oakland County Drain Commissioner v. City of Royal Oak, 325 Mich. (adv. sheets) 298, and unofficially as Clark,

[*]

Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief, refer to pages of the printed transcript of the record.

County Drain Commissioner, v. City of Royal Oak, 38 N.W. 2d 413.

The opinion of the trial judge will be found in the transcript of the record (193).

II

Counter-Statement on Jurisdiction.

We may concede that the writ of certiorari was applied for within 90 days after entry of judgment in the court below, pursuant to Title 28, U.S.C., § 2101 (c).

Petitioners invoke the jurisdiction of this Court, Title 28, U.S.C., § 1257, on the ground that in the court below, rights, privileges and immunities were specially set up and claimed by them under an interlocutory decree (42) of the district court of the United States for the eastern district of Michigan, southern division, approving a plan proposed in proceedings for composition by a public debtor, *viz.*, the Royal Oak Drain district, Oakland County, Michigan, all pursuant to Title 11, U.S.C., § § 401-403.

Whether the Court should exercise such jurisdiction in this cause depends largely, we assume, upon the substance or lack of substance in such claim, and whether the decision of the court below is plainly right and in accordance with well-considered judgments of this Court in similar cases, Supreme Court Rule 38 (5).

It is our position:

1. The Supreme Court of Michigan did not decide a federal question of substance.

2. The court below decided the question presented in petitioners' "reasons and grounds of appeal" (206) in a way which is in accord with applicable decisions of this Court, Supreme Court Rule 38 (5 [a]), decisions which, we respectfully submit, control the issue here:

Municipal Investors Ass'n v. City of Birmingham, 316 U.S. 153, affirming 298 Mich. 314, 299 N.W. 90;

Keefe v. Clark, Drain Commissioner, 322 U.S. 393, affirming 306 Mich. 503, 11 N.W. 2d 220.

III

Counter-Statement of the Matter Involved.

We respectfully note, Supreme Court Rule 27, the following inaccuracies and insufficiencies in petitioner's statement:

1. It is said, petition, p. 3, that when the decree of confirmation (42) was entered by the bankruptcy court on the 6th day of February 1941, "no question was * * * entertained as to these lands being fully taxable for all purposes as soon as such restoration (to private ownership) should occur. There were then no court decisions dealing with the subject, * * * and the applicable statutes * * * seemed to justify the conclusion that all privately owned lands, irrespective of their source of title, would be subject to the additional assessments provided in paragraph 8 of the plan of composition".

Counsel overlook the fact that the impairment argument was presented in a decision of the court below on September 6, 1940,

Baker v. State Land Office Board, 294 Mich. 587,

wherein it was held, *inter alia,* that purchasers of municipal bonds are assumed to have purchased with the knowledge that the lien upon the property securing taxes and assessments for the payment thereof might be displaced, Act 155, Pub. Acts 1937, as amended.

That the *Baker* case, *supra,* foreshadowed decision in *Keefe v. Oakland County Drain Commissioner,* 306 Mich. 503, clearly appears from the opinion of this Court affirming the judgment of the Michigan supreme court, 322 U.S. 393, 397, note 3, wherein it is said:

> "The Michigan Supreme Court has described vividly the intimate relation between the power of the State to remove encumbrances from tax-delinquent lands and the welfare of the public. *Baker v. State Land Office Board,* 294 Mich. 587, 592-594".

2. It is thought essential to a clear understanding of the question presented, that we set forth in chronological order a short, concise history of certain judicial decisions in closely-related cases which grew out of legislation enacted for the purpose of solving Michigan's tax problem during the years of depression, as well as in connected cases involving the bond issue now considered:

Jan. 14, 1937:

Royal Oak Drain District v. Keefe, 87 F. 2d 786, was a suit by non-resident bondholders brought in the district court of the United States for the eastern district of Michigan, southern division, against the Royal Oak Drain District and others. Both the district court and the circuit court of appeals, 6th Circuit, upheld the right of the drain district to construct the drain in question, to issue bonds and levy assessments therefor.

We note that in the cause aforesaid, the court reserved jurisdiction for the purpose of carrying its decree into effect, and to grant any further relief necessary.

In the case at bar in the court below, cross-appellants (Cities of Pleasant Ridge and Huntington Woods and others, *not the petitioners*) claimed that the decree entered in the cause aforesaid, 87 F. 2d 786, reserved judgment to adjudicate further rights of the parties, and they contended that the State courts had no jurisdiction as it would be a collateral attack on the decree of the Federal court. The court below held that this was not a collateral attack since entirely new questions were raised in the case at bar. Since the petitioners do not raise it here, that question is not present.

Feb. 6, 1941:[1]

In the Matter of Royal Oak Drain District, pending in the district court of the United States for the eastern district of Michigan, southern division, an *interlocutory decree* was entered (42) in proceedings for composition by a public debtor, namely, the Royal Oak drain district, pursuant to chap. 9 of the bankruptcy act, Title 11, U.S.C., § §401-403, approving a plan of composition, as amended,[2] which had been proposed by the district.

With respect to such proceedings, it may be noted:

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[1]

Meanwhile, on July 3, 1937, Michigan's "scavenger sale" law, so-called, discussed by this Court in a subsequent decision, 322 U.S. 393, became effective, and this statute was amended June 15, 1939, by Act 244, 1939.

[2]

The court suggested (43) these amendments.

(a) although the decree adjudges (44) that "the petitioner is authorized by law to take all action necessary to be taken by it to carry out the said plan of composition, as amended", the record does not clearly indicate that in this regard the action was adversary, or that any objecting creditor raised the question of law later decided by the court below, 298 Mich. 314, 306 Mich. 503, and by this Court, 322 U.S. 393, *i.e.*, whether Michigan's State land office board act ("scavenger sale") of 1937, as amended in 1939, was valid as against such bondholders; therefore, we think, it may be said, that the district court merely assumed that the drain district was authorized to levy additional assessments against parcels of land title to which had passed through the State to private ownership, relieved of such incumbrances; and

(b) the decree was "interlocutory" (42) and the court retained jurisdiction (45) for the purpose of determining fees, expenses, etc., "and for any other purpose or purposes in connection with the completion of the consummation of said plan of composition, as amended, and for any other purpose or purposes contemplated by the Federal Bankruptcy Act", and so far as this record discloses, no final decree was entered.[3]

June 30, 1941:

Municipal Investors Association v. City of Birmingham, 298 Mich. 314, 299 N.W. 90, denied a writ of mandamus to compel the city and others to assess additional taxes on certain lands in said city to pay special assessment bonds issued in connection with a street-paving project, thereby

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[3]

The writer of this brief is not informed whether this is an actual fact, though the record shows that the petitioners rely upon the "interlocutory decree".

upholding the constitutionality of Michigan's State land office board act, as amended,[4] as well as an amendment to the general property tax law of that State.[5] The court held, Syl. 6,

> "In providing for the cancellation of liens for taxes and special assessments on real estate upon vesting of absolute title in the State after sale for delinquent taxes and failure of former owner to redeem and for disposition thereof by the State at the so-called scavenger sale, neither the general property tax law nor the State land office board act contravenes the requirements of the Constitutions of the State or United States forbidding the impairment of the obligations of contract (U.S. Const. art. 1, § 10; Mich. Const. 1908, art. 2, § 9)".

April 27, 1942:

Municipal Investors v. Birmingham, 322 U.S. 153, affirmed the judgment of the court below in 298 Mich. 314, 299 N.W. 90, though it did not pass upon the constitutional question presented. The Court held in substance that various provisions of Michigan statutes, did not establish a contractual right in the bondholders to require that the municipality, in order to meet deficiencies in the collection of assessments, shall re-assess lots in the improvement district which had been sold for non-payment of the original assessments.

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[4]

Act No. 155, Mich. Pub. Acts of 1937, as amended by Act No. 244, Mich. Pub. Acts of 1939.

[5]

Act No. 114, Mich. Pub. Acts of 1937, amending general property tax law.

Oct. 11, 1943:

Keefe v. Oakland County Drain Commissioner, 306 Mich. 503, 11 N.W. 2d 220, modified and affirmed a declaratory judgment which determined that the defendants were not obligated by the Michigan drain law,[6] to levy an additional assessment to cover a deficiency in a drain tax.

The plaintiffs were owners of bonds which were part of the original issue in 1927 of $300,000 to finance the construction of a storm sewer drain.

The Michigan Supreme Court held, *inter alia,* that lands which have passed through "scavenger" sales were exempt from *future* assessments for prior benefits to the land.

May 22, 1944:

Keefe v. Clark, Drain Commissioner, 322 U.S. 393, affirmed the judgment of the court below in the cause aforesaid, 306 Mich. 503, 11 N.W. 2d 220. The Court held that the Michigan statute upon which the owners of special assessment bonds there relied (see footnote 6), and upon which the petitioners in the case at bar *now* rely, petition, pp. 4-5,[7]

> "dealing with the levy of an additional assessment in the event that the bonds are not paid in full at matur-

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[6]

Act No. 316, chap. 10, § 18, Mich. Pub. Acts of 1923, as amended by Act No. 331, 1927 and Act No. 129, 1939. See Mich. Stat. Ann. (Henderson), 1947 Cum. Supp. § 11.104. Now published in Mich. Comp. Laws 1948, Vol. 2, § 270.18.

[7]

The statute cited in the petition, p. 4, is Act No. 129, Mich. Pub. Acts of 1939, which amended § 18 of chap. 10 of the Michigan drain law cited in note 6.

ity, did not secure to the bond owners any right which was impaired by later statutes providing for sale by the State, free of all encumbrances, of land for unpaid taxes; and the later statutes did not impair the obligation of their contracts in violation of the Federal Constitution".

IV

Question Presented.

The question for immediate consideration, of course, is whether the Supreme Court of Michigan decided a federal question of substance, and whether the decisions cited above control the issues involved.

V

Reasons for denying writ.

1. It might be said, without being too captious, there is some doubt whether a federal question, as such, was actually raised in the trial court or in the court below, whether any title, rights, privilege, or immunity was "especially set up or claimed" under a statute of the United States.

(a) Appellants' "reasons and grounds of appeal" set up in the court below (206) do not indicate that a Federal question is there presented; no mention is made of the interlocutory decree of the United States district court in the bankruptcy proceedings; the bankruptcy act is not cited; and the only reference is to certain paragraphs of the drain commissioner's order of April 17, 1941.

(b) Nor did petitioners' answer (69-77), filed as defendants in the circuit court, indicate such a claim; it was "their desire to have the programme laid out in the drain commissioner's order of April 17, 1941 fully performed, irrespective of whether there may be ultimate shortage or not" (70).

They insisted in their answer (71) that when a drain district "does issue refunding bonds and certificates of indebtedness, and compels their acceptance by creditors by virtue of proceedings taken by it in bankruptcy proceedings, it thereby accepts the provisions made applicable to such securities by Act 129 of Michigan Public Acts 1939",

> "and all lawful orders made by the drain commissioner under it, and same become binding upon all property owners in the district and upon all political subdivisions subject to at large assessments for the drain. Defendants allege that additional assessments may be levied against all lands in said district which are otherwise taxable, and to the extent that any lands become exempt by any stutute or proceedings under it, the loss of resources for debt payment must be absorbed by the *remaining* lands and the political subdivisions subject to at large taxes". [Emphasis, ours].

This, we respectfully submit, is not an unqualified reliance upon Federal rights; it is based upon a Michigan statute, the same law which this Court later held, 322 U.S. 393, did not secure to bond holders any vested rights.[8]

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[8] It is true that appellants, in their brief, contended that the decree of the bankruptcy court was binding upon the drain commissioner.

2. The court below expressed two opinions, 325 Mich. 311, 38 N.W. 2d 417-418, on the subject: (a) they doubted "if the taxpayers were bound by the decree of the Federal court in the composition proceedings", and (b) they held that even though taxpayers were so bound, "such decree wound not be binding as to the rights and duties of the drain commissioner *under State laws*" (emphasis supplied), the construction and interpretation of which "are binding on the Federal courts".

We respectfully submit the Michigan Supreme Court were right on both counts of their decision:

(a)

The decree of the bankruptcy court was not binding on taxpayers or State taxing officers.

The controversy, if any, was between the petitioning drain district, which sought approval of the proposed composition plan, and objecting creditors. Taxpayers, the purchasers of land offered by the State at "scavenger" sale, prospective purchasers of such land, State taxing officers, and members of the State land office board, were not parties to the composition proceedings, nor were they represented by counsel.[9]

That the State itself was virtually interested in the subject-matter of subsequent levies upon property title to which had or would vest in purchasers at the "scavenger" sales, appears from the opinion of the court below in the

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[9]

While it is true that the public debt commission approved the refunding bonds, there was nothing in the act of their creation, Act No. 13, Mich. Pub. Acts 1932, Ex. Sess., which militated against the doctrine of Keefe v. Drain Commissioner, 306 Mich. 503.

Keefe case, which was summarized by this Court, 322 U.S. 393, 396, as follows:[10]

> "Emphasizing the serious consequences of such a hobbling of the State's powers to meet pressing problems, the Court pointed out that the powers of the State to sell tax-delinquent lands free of the burden of assessments for completed drain projects was essential not only to protect the bondholders themselves but to protect the public interest. Without power in the State to offer an attractive title to prospective purchasers, the Court found, many of such lands would remain tax-delinquent and thereby be rendered valueless for all public revenue purposes, including drain assessments. The Court declined to read into the statute relied upon by appellants any purpose to permit drain districts to surrender the State's sovereign power to provide for the sale of tax-delinquent property free of encumbrances. It held that under the Michigan law in effect when appellants' special assessment drain bonds were issued the bondholders' 'maximum security' for payment of assessments against drain district lands was the parcels of land themselves, and that when the bondholders received their fair share of the proceeds derived from the tax sale of any particular parcel they had received everything to which their bond contracts entitled them. *Keefe v. Oakland County Drain Comm'r,* 306 Mich. 503, 511-512, 11 N.W. 2d 220."

We fail to see how the decree of the court could possibly bind the taxpayers of the taxing unit, or determine the

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[10] This was in answer to the argument that the Michigan legislature was powerless to provide that purchasers of tax-delinquent property in the drain district be exempt from a deficiency drain assessment.

rights of those persons who later acquired title from the State at "scavenger" sales.

(b)

Nor was the decree binding as to the rights and duties of the drain commissioner under State laws.

If the decree of the district court be construed [as petitioners insist] to constitute a final adjudication respecting the duties of the drain commissioner under Michigan statutes as interpreted by the Supreme Court of that State in an opinion affirmed by this Court, it would now require him to violate such laws, a wholly inconveivable situation.

Be that as it may, however, it manifestly appears that the district court did not adjudicate the *precise* question presented in the pending petition for certiorari. The bankruptcy court did find (44), as indeed it was required by law, Title 11, U.S.C. § 403, to do, that the petitioner was "authorized by law to take all action necessary to be taken by it to carry out the * * * plan of composition, as amended". Which meant, of course, that the drain district was so authorized by *State law, United States v. Bekins,* 304 U.S. 27. And it is also obvious that the State of Michigan had given its consent to the filing of a petition under the bankruptcy law, Act No. 72, Mich. Pub. Acts of 1939. That act provided, in part:

> "The governing authority of any such taxing agency having authority to levy taxes to meet the obligations to be affected by the plan of composition may file the petition and agree upon any plan of composition authorized by said act of Congress, and may include in such plan of composition any terms and conditions relating to readjustment, alteration, extension and reassess-

ment of taxes and assessments which they may deem advisable. Such plan of composition, when approved by the court as provided in said act of Congress, shall be binding upon such taxing agency or instrumentality".

It should, we think, be born in mind that the same legislature which enacted Act No. 72, *supra,* effective May 3, 1939, also amended the State land office board ("scavender sale law") by passing Act 244, Mich. Pub. Acts 1939, effective June 15, 1939, and, we respectfully submit, all of these statutes should be construed as constituting one harmonious system of tax enforcement.

Although it may have been believed by all parties concerned that the Michigan tax statutes cancelled only special drain assessments against state acquired lands, which had already been made (including future due installments thereof), but did not cancel the right to make future drain assessments against lands restored to private ownership, this theory is not clearly expressed in Act No. 72, *supra,* nor in the plan of composition (38), nor in the decree (42) approving it. Paragraph 8 of the plan (38-39) provided that the spread of special assessments should be "(exclusive of any part thereof cancelled by the terms of Act No. 155 of the Public Acts of 1937, as amended)", and that deficiency assessments each year "shall be levied under the provisions of Act No. 129 of the Public Acts of 1939 against the various political subdivisions and parcels of land in the special assessment district, in proportions as originally assessed".

This language, we respectfully submit, left the Supreme Court of Michigan free to construe, interpret and apply the provisions of the "scavenger" sale act, as well as the terms of Act No. 129, Mich. Pub. Acts 1939, and to hold, as they later did in the case of *Keefe, supra,* that lands which have

passed through "scavenger" sales were exempt from future assessments for prior benefits to the land.

Otherwise, the power of the State to meet pressing problems of the nature referred to in the *Keefe* case, 322 U.S. at 396, would be hobbled by a strained construction of the decree of the bankruptcy court.

Our position, therefore, is that the district court did not decree, and the plan of composition which it approved, did not provide that lands which had passed through "scavenger" sales would be subject to the reassessment mentioned in the plan. Nor was the question presented for decision on clearly-defined issues in the composition proceedings.

VI

Conclusion.

We, therefore, respectfully submit that the petition for writ of certiorari should be denied.

Respectfully Submitted,

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